SU CHII LEONG

v.

ORIX CREDIT MALAYSIA SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[CIVIL APPEAL NO: 12-51-2002-III(I)]
5 DECEMBER 2003

HIRE-PURCHASE: *Guarantee and indemnity - Agreement - Validity of - Whether guarantee and indemnity executed by guarantor void - Whether guarantor had undertaken to pay financier an aggregate sum which is larger than balance originally payable by hirer under hire-purchase agreement - Whether guarantee and indemnity had to be executed in the presence of magistrate, commissioner for oaths or notary public - Hire Purchase Act 1967, s. 22*

CONTRACT: *Hire-purchase - Guarantee and indemnity - Agreement - Validity of - Whether guarantee and indemnity executed by guarantor void - Whether guarantor had undertaken to pay financier an aggregate sum which is larger than balance originally payable by hirer under hire-purchase agreement - Whether guarantee and indemnity had to be executed in the presence of magistrate, commissioner for oaths or notary public - Hire Purchase Act 1967, s. 22*

This was an appeal by the 3rd defendant/guarantor to the judge-in-chambers from the decision of the sessions judge allowing the plaintiff/financier to enter summary judgment against the 3rd defendant in the sum of RM38,191. The plaintiff had earlier sued the 3rd defendant in his capacity as a guarantor to a motor-vehicle hire-purchase agreement entered into between the 1st defendant/hirer and the plaintiff. Before the judge-in-chambers, the 3rd defendant argued that he was not liable under the guarantee and indemnity he executed in favour of the plaintiff because the plaintiff had failed to comply with ss. 4, 5, 16 and 22 of the Hire Purchase Act 1967 ('the Act').

Held (allowing the appeal):

[1] There was merit in the 3rd defendant's contention that the plaintiff's failure to comply with s. 22 of the Act was fatal to the guarantee and indemnity executed by the 3rd defendant. Under s. 22 of the Act, the said guarantee and indemnity had to be executed "in the presence of a magistrate, a commissioner for oaths or a notary public" because the 3rd defendant had undertaken "to pay to the owner an aggregate sum which is larger than

the balance originally payable under the (hire-purchase) agreement". The objective of s. 22 of the Act is to ensure that when a guarantor undertakes an obligation that is larger than the one that is imposed on the hirer, the guarantor does so voluntarily and with his eyes opened, fully appreciative of the consequences of his undertaking. The guarantee and indemnity executed by the 3rd defendant in favour of the plaintiff was, consequently, void for non-compliance with s. 22 of the Act. (pp 686 e-h, 687 a-h, 688 a-h, 689 a-h & 690 a-d)

Legislation referred to:
Hire-Purchase Act 1967, ss. 4, 5, 16, 22
Hire-Purchase Regulations 1967, r. 3

Hire-Purchase Act 1960-1965 [NSW], s. 19

For the appellant - Kenny Yi Lee Chuen; M/s Yi & Co
For the respondent - Lau Mei Ling; M/s Sim & Yee

Reported by Gan Peng Chiang

JUDGMENT

Clement Skinner J:
This is the hearing of an appeal by the third defendant (hereafter 'the appellant') against the decision of the learned Sessions Court Judge, given on 19 November 2002, granting summary judgment in favour of the plaintiff (hereafter 'the respondent') in the sum of RM38,191 with interest thereon at 8% per annum from 4 July 2000 until full and final payment.

The appellant was sued in his capacity as a guarantor to a hire-purchase agreement entered into between the first defendant and the respondent in respect of a motor vehicle. There is no dispute between the parties that the subject matter of the hire-purchase agreement is governed by the Hire-Purchase Act 1967 (Act 212) (hereafter 'the Act').

The appellant raised several grounds of appeal against the decision of the learned Sessions Court Judge. Thus it was argued that the appellant was not liable under his guarantee because:

(1) the respondent had failed to comply with s. 4 of the said Act;

(2) the respondent had failed to comply with s. 5 of the said Act;

(3) the respondent had failed to comply with s. 16 of the said Act and with r. 3 of the Hire-Purchase Regulations 1967;

(4) the respondent had failed to comply with s. 22 of the said Act.

After having heard submissions on all the above points, I indicated that I did not find any merit in the arguments raised by the appellant in support of grounds (1), (2) and (3) above but allowed his appeal on the 4th ground. As the respondent is dissatisfied with my decision made on 31 October 2003, 1 now give my reasons for the same and will confine myself to the 4th ground only.

The following facts which are not in dispute between the parties are relevant to my decision:

(i) the deed of guarantee and indemnity contained the following express terms and conditions:

(a) an undertaking by the appellant in cl. 1 to indemnify the respondent against all losses, expenses (including legal costs on a full indemnity basis) charges and damages incurred or suffered by the respondent in consequence of any failure by the hirer to perform any of the hirer's obligations under the Hire Purchase Agreement; and

(b) an undertaking by the appellant in cl. 4 to indemnify the respondent against all legal proceedings, claims and demands whatsoever made by the hirer arising out of any alleged warranty and/or representation or otherwise in respect of the said vehicle.

(ii) the appellant did not execute the guarantee in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public; instead, it was executed in the presence of one Ng Mee Kon of UOL Credit Sdn Bhd, Kuching.

I will next state the provisions of s. 22 of the Act which reads:

2.2 Guarantor not to be bound in certain cases

Where a guarantor of the performance of the obligations of the hirer under a hire-purchase agreement enters into an agreement binding the guarantor:

(a) to pay to the owner an aggregate sum which is larger than the balance originally payable under the agreement;

or

(b) to perform an obligation in respect of goods other than the goods comprised in the hire-purchase agreement,

the agreement so entered shall be void unless the agreement is executed by the guarantor in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public.

This appeal is concerned with the first limb of s. 22 because it is the appellant's case that in entering into the guarantee, he had bound himself to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire-purchase agreement. According to the appellant, this position becomes apparent when a comparison is made between the aggregate of the sums he has bound himself to pay under the guarantee with the balance originally payable by the hirer (1st defendant) under the hire-purchase agreement.

Thus, the appellant points out that by cl. 4 of the guarantee, if the respondent became liable to pay the hirer for the breach of any warranty or representation in respect of the said vehicle, the appellant was obliged to indemnify the respondent in respect of such liability, whereas there was no corresponding clause in the hire-purchase agreement which precluded the hirer from bringing such a claim against the respondent.

The appellant further points out that by cl. 1 of the guarantee, he became obliged to indemnify the respondent against all expenses, including legal costs on a full indemnity basis incurred or suffered by the respondent in consequence of any failure by the hirer to perform any of the hirer's obligations under the hire-purchase agreement, whereas under the hire-purchase agreement there was no obligation on the hirer (1st defendant) to indemnify the respondent against all legal costs on a full indemnity basis.

Accordingly, the appellant says that he had entered into an agreement binding himself to pay the respondent an aggregate sum which is larger than the balance originally payable by the 1st defendant as hirer under the hire-purchase agreement. That being the case, it is the appellant's stand that the guarantee should have been executed before a Magistrate, a Commissioner for Oaths or a Notary Public as expressly required by s. 22 but as it was not so executed, it is void.

As against this, the respondent argued that the appellant had never been asked, as guarantor, to perform any obligation which bound him to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire-purchase agreement because firstly, the balance originally payable under the hire-purchase agreement was RM108,466.25. However the hirer (1st defendant) had made some 10 instalment payments so that when default under the agreement occurred, a balance of only RM38,191 was owing and that was the sum demanded from the appellant under the guarantee, which is far less than the balance originally payable under the hire-purchase agreement and so there was no need for the guarantee to be executed before a Magistrate, a Commissioner for Oaths or a Notary Public. It was next said by the respondent

that under cl. 3 of the guarantee, the appellant had agreed to be jointly and severally liable as principal debtor regardless of whether the hire-purchase agreement is held to be invalid, unenforceable or terminated, and therefore, the appellant is bound to pay the respondent the sum now demanded from him as principal debtor.

I regret I found both points taken by the respondent untenable. With regard to the respondent's first point, its argument, if upheld, would mean that it is only at the point in time when a demand is made on a guarantor or a suit is brought against him, and not at the time the guarantee is executed, that it is to be determined whether or not the guarantee should have been executed before a Magistrate, a Commissioner for Oaths or a Notary Public. The respondent's argument may be put in another way. What it says is this: If the amount demanded from the guarantor happens to be less than the balance originally payable under the hire-purchase agreement, then it matters not whether the guarantee was executed before a Magistrate, a Commissioner for Oaths or a Notary Public even though the guarantor had bound himself, when entering into the guarantee, to pay to the owner an aggregate sum which is larger than the balance originally payable under the hire-purchase agreement.

In my judgment the respondent cannot be right or correct in its argument for the following reasons. The Hire-Purchase Act was enacted for the benefit or protection of the consumer. The purpose behind requiring a guarantor who binds himself to pay the owner an aggregate sum which is larger than the balance originally payable under the hire-purchase agreement, to execute his guarantee before a Magistrate, a Commissioner for Oaths or a Notary Public is to ensure that the guarantor understands the true purport and effect of the agreement he has signed or that he at least has had the opportunity of doing so by attending before such a person, so that he can be said to have entered into the transaction with open eyes. It would defeat the purpose behind s. 22 of the Act if the respondent's argument is upheld. I find support for what I say by looking at the position under comparable consumer legislation to our Hire-Purchase Act. Such comparison can be found in s. 19 of the New South Wales Hire-Purchase Act 1960-1965 ('the New South Wales Act') which counsel for both parties referred me to.

Section 19 reads:

> (1) Where a guarantor of the performance by a hirer of all or any of the hirer's obligations under a hire-purchase agreement enters into an agreement binding the guarantor:

(a) to pay the owner under the hire-purchase agreement an aggregate sum that is larger than the balance originally payable under the hire-purchase agreement;

(b) to perform an obligation in respect of goods other than the goods comprised in the hire-purchase agreement;

(c) to permit the owner under the hire-purchase agreement or any person acting on behalf of the owner to enter upon any premises for the purpose of taking possession of or inspecting goods subject to the hire-purchase agreement;

or

(d) to relieve the owner under the hire-purchase agreement or any person acting on behalf of the owner from liability for any such entry;

the agreement so entered into by the guarantor is void (and the owner under the hire-purchase agreement concerned is guilty of an offence under this Act) unless the agreement is executed by the guarantor in the presence of a chamber magistrate, a clerk of petty sessions or a solicitor instructed and employed independently of the owner and the magistrate, clerk or solicitor, as the case may be, certifies in writing upon the agreement:

(e) that he is satisfied that the guarantor understands the true purport and effect of the agreement; and

(f) that the guarantor has executed the agreement in his presence.

(2) a chamber magistrate, a clerk of petty sessions or a solicitor shall not give a certificate in respect of an agreement under subsection one of this section unless:

(a) he has read over and explained the agreement to the guarantor or has caused the agreement to be read over and explained to the guarantor in his presence;

(b) he has examined the guarantor touching his knowledge of the agreement;

(c) he is satisfied that the guarantor understands the true purport and effect of the agreement; and

(d) the guarantor has freely and voluntarily executed the agreement in his presence.

(3) Failure by a chamber magistrate, a clerk of petty sessions or a solicitor to comply with subsection two of this section in respect of a certificate does not invalidate the certificate.

Although s. 19 of the New South Wales Act is slightly different from s. 22 of our Act in that our s. 22 does not make it an offence if the owner does not comply with the section and it is not spelt out in our section what a Magistrate, a Commissioner for Oaths or a Notary Public does when a guarantor appears before him to execute the guarantee, in my judgment the objective of both provisions is similar ie, to ensure that when a guarantor undertakes an obligation that is larger than that imposed on the hirer, the guarantor does so voluntarily and with open eyes, fully appreciative of the consequences of such an undertaking.

The point of time at which the guarantor becomes bound under the guarantee is when he executes it although no liability to indemnify or pay thereunder will arise until default under the hire-purchase agreement occurs. Notwithstanding the fact that liability under a guarantee is a contingent event which may never materialise, it would only be possible to say that a guarantor has entered into his obligations with open eyes and has had an opportunity to independently decide whether to become so bound or not if he is aware of or has had the opportunity of making himself aware of what he is binding himself to. It must follow therefore that the point of time at which he must 'open' his eyes and be fully appreciative of the consequence of entering into the guarantee is when he executes it and not *ex-post facto*.

With regard to the respondent's second point, namely, that the appellant remained liable as principal debtor under cl. 3 of the guarantee, I regret I found the argument untenable because we are here not at all concerned with whether the hire-purchase agreement is invalid or unenforceable or has been terminated. We are here concerned with whether the guarantee itself is void for the reasons stated in s. 22. If it is void, then the guarantee, is worthless and no reliance can be placed on the principal debtor clause found in it.

Reverting to the guarantee which was executed by the appellant in this case, I agree with counsel for the appellant that for the reasons given by him, the appellant had, when entering into the guarantee, bound himself to pay the respondent an aggregate sum which is larger than the balance originally payable under the hire-purchase agreement. The guarantee should, therefore, have been executed in the presence of a Magistrate, a Commissioner for Oaths or a Notary Public and not having been so executed, is void.

It was for the above reasons that I allowed the appellant's appeal with costs here and below.